

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 05-24 ERIE
)	
BARRY WAYNE LEWIS)	

SENTENCING

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Thursday, August 9, 2007.

APPEARANCES:

CHRISTINE A. SANNER, Assistant United States
Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public
Defender, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

1 P R O C E E D I N G S

2
3 (Whereupon, the proceedings began at 10:26 a.m., on
4 Friday, August 9, 2007, in Courtroom C.)

5
6 THE COURT: This is the time that we have set for
7 sentencing in the case of United States v. Barry Wayne Lewis.
8 And we do have a number of objections to take up. Mr. Patton.
9 Before we get rolling on the real substantive matter, which is
10 the armed career offender classification, there was an
11 objection to, I think the original presentence calculation had
12 only afforded two, rather than three points, for acceptance of
13 responsibility, was that it?

14 MR. PATTON: I think so, your Honor. But there was
15 a plea agreement where the government agreed to three levels.

16 THE COURT: Let me get this on the record, then we
17 can get rolling. Let me indicate on the record what the --
18 recognizing that there is a dispute concerning career offender
19 status, let me indicate on the record what the total offense
20 level and criminal history category would be, assuming that
21 career offender status applies, and then we can take up the
22 issue as to its applicability.

23 The total offense level is a 30. With a criminal
24 history category of IV. Statutory provision as to custody not
25 less than 15 years imprisonment. The guideline 180. Statutory

1 provision as to probation ineligible. Also ineligible under
2 the guidelines. Statutory provision as to supervised release
3 not more than five years. Guideline provisions at least three
4 but not more than five years. Statutory provision as to a fine
5 \$250,000. Guidelines \$15,000 to \$150,000. Restitution is
6 inapplicable under both the statute and the guidelines. And a
7 special assessment of \$100 applies with respect to both.

8 Recognizing you're challenging the career offender
9 status, there is no objection to the accuracy of those
10 calculations or guidelines in the event that it applies?

11 MR. PATTON: Yes, it's armed career criminal.

12 THE COURT: I meant to say armed career criminal.
13 All right. Mr. Patton.

14 MR. PATTON: Your Honor, first of all, just to
15 preserve the argument, we want to argue that the court should
16 not be allowed to make factual findings that are necessary to
17 find that Mr. Lewis's prior convictions meet the Armed Career
18 Criminal Act's definition of a crime of violence.

19 THE COURT: You're not waiving that.

20 MR. PATTON: Your Honor, the dispute in this case
21 centers around the conviction for burglary that's in paragraph
22 34. In the objections that we sent to Mr. Lowers, we objected,
23 number one, to the presentence report's description, factual
24 description of the offense, saying that we are not admitting to
25 those facts and object to those facts. And, indeed, in the

1 response, in the addendum identified those facts come from
2 police reports. And as the Supreme Court has made clear in
3 Shepard, your Honor cannot look to police reports in deciding
4 whether or not a conviction qualifies as a crime of violence
5 under the Armed Career Criminal Act. The burglary conviction
6 is not a crime of violence under the Armed Career Criminal Act.
7 First off, the Ohio burglary statute is much broader than the
8 generic burglary as defined by the United States Supreme Court.

9 THE COURT: Could you hold your thought for one
10 second. Okay.

11 MR. PATTON: Your Honor, in Taylor v. United States,
12 the Supreme Court found that, as used in the Armed Career
13 Criminal Act, the term burglary refers to generic burglary,
14 which the Supreme Court defined as an "unlawful or unprivileged
15 entry into, or remaining in, a building or structure, with the
16 intent to commit a crime." The Ohio burglary statute is much
17 broader than generic burglary. Because an Ohio burglary
18 addresses entry into an occupied structure. And an occupied
19 structure is defined in Section 2909.01 of the Ohio Revised
20 Code as follows:

21 "Occupied structure means any house, building,
22 outbuilding, watercraft, aircraft, railroad car, truck,
23 trailer, tent, or other structure, vehicle, or shelter, or any
24 portion thereof, to which any of the following applies:"

25 Then it has a list of four different ways that any

1 of those items can be an occupied structure.

2 "(1) It is maintained as a permanent or temporary
3 dwelling, even though it is temporarily unoccupied and whether
4 or not any person is actually present.

5 (2) At the time, it is occupied as the permanent or
6 temporary habitation of any person, whether or not any person
7 is actually present.

8 (3) At the time, it is specially adapted for the
9 overnight accommodation of any person, whether or not any
10 person is actually present.

11 (4) At the time, any person is present or likely to
12 be present in it," it can be an occupied structure.

13 Now, under those definitions, if someone is living
14 in their car and is, therefore, the car is occupied as the
15 temporary or permanent habitation of a person, a car is an
16 occupied structure. If a boat is being used as a permanent or
17 temporary habitation, it meets the definition of occupied
18 structure. And there's no requirement that any person actually
19 be present at the time of the offense. So, clearly, under the
20 definition of occupied structure, the Ohio burglary statute is
21 broader than generic burglary.

22 Now, the government's papers seems to put a lot of
23 emphasis on the use of the word habitation, and trying to argue
24 that habitation must mean a structure. But Section 2909.01
25 just shows that to be completely wrong. Because occupied

1 structure can be a house, a watercraft, an aircraft, a railroad
2 car, a truck, a trailer, a tent, a vehicle, or shelter. If any
3 one of those is occupied as the permanent or temporary
4 habitation of a person. So habitation does not equal building.

5 Now, originally Mr. Lewis was charged with
6 aggravated burglary. And the aggravated burglary charge that
7 Mr. Lewis had trespassed in an occupied structure as defined in
8 Section 2909.01 of the Revised Code, or in a separately secured
9 or separately occupied portion thereof, with the purpose to
10 commit therein a theft offense, as defined in Section 2913.01
11 of the Revised Code, or a felony, and the occupied structure
12 involved in the permanent or temporary habitation of Adelbert
13 Cross in which at the time any person was present or likely to
14 be present. That's the original charge.

15 THE COURT: Amended, per the court docket, to just
16 burglary?

17 MR. PATTON: Correct. Even the charge as originally
18 put out in the aggravated burglary charge, does not identify
19 what the occupied structure was. Whether the occupied
20 structure was a building or whether it was a watercraft,
21 whether it was an airplane, whether it was a vehicle, or a
22 railroad car or a tent. The term "occupied structure" is a
23 term of art under -- actually it's a defined term --

24 THE COURT: Statutory term.

25 MR. PATTON: Under Ohio law. And it is what

1 governs. One way an item can be an occupied structure is if it
2 is occupied as the permanent or temporary habitation of a
3 person. But simply because it is a temporary or permanent
4 habitation of a person, does not mean it's a building. It can
5 be any of those items that are listed in the introductory
6 paragraph to subsection (C) of 2909.01.

7 Now, when the burglary statute, excuse me, the
8 aggravated burglary charge was amended to burglary, it
9 substantially altered the elements that the state was required
10 to prove and the elements that Mr. Lewis would have had to
11 admitted to, to plead guilty. The Ohio Supreme Court in
12 State v. Wilson, which is cited in our papers, explained in
13 detail the difference under Ohio law between an aggravated
14 burglary and a burglary.

15 THE COURT: Not to put a finer point on it but to
16 put that Wilson case in context, the court in Wilson, which is
17 the Ohio Supreme Court case, correct?

18 MR. PATTON: That is correct.

19 THE COURT: Was called upon to determine whether
20 there was an equal protection problem with respect to the
21 aggravated burglary statute and the regular burglary statute,
22 is that right?

23 MR. PATTON: That's correct. The defendant took the
24 position that there is no difference between the two statutes.
25 They have the same elements and require the same proof. And

1 since they require the same proof, you can't sentence me to the
2 enhanced penalties under the aggravated burglary statute, you
3 can only sentence me to the penalties under the burglary
4 statute. So the argument by the defendant was there's no
5 difference between aggravated burglary and burglary under Ohio
6 law. And so the Ohio Supreme Court had to decide whether or
7 not there was in fact a difference under Ohio law between
8 aggravated burglary and burglary. And the Ohio Supreme Court
9 said that there in fact was a difference. The difference is
10 that under a regular burglary charge, to meet the definition of
11 occupied structure, the state only has to prove one of the four
12 subsections under Section (C) of 2909.01. If any one of those
13 present --

14 THE COURT: You said for aggravated burglary?

15 MR. PATTON: For burglary. For burglary, if any one
16 of those is proved and you show the unlawful breaking into with
17 the intent to commit the offense --

18 THE COURT: Because they're in the disjunctive?

19 MR. PATTON: Correct. They said for the aggravated
20 burglary, you have to show a burglary, but there has to be one
21 of three aggravators. One of the aggravators is that the
22 offender inflicts, or attempts or threatens to inflict physical
23 harm on another. The second one is if the offender has a
24 deadly weapon or dangerous ordnance as defined under Ohio law.
25 Or the occupied structure involved is the permanent or

1 temporary habitation of any person, in which at the time any
2 person is present or likely to be present. Now, in the Wilson
3 case, it was that last aggravator that the state had charged
4 the defendant with. And saying that it was aggravated burglary
5 because the occupied structure was a permanent or temporary
6 habitation of a person, in which at the time any person was
7 present or likely to be present. And what the Ohio Supreme
8 Court said is that that third aggravator is a combination of
9 the second and fourth subsection of 2909.01. But as the
10 aggravator is written in the aggravated burglary statute, it
11 requires proof of both. You have to prove both that the
12 occupied structure is the permanent or temporary habitation of
13 any person; and at the time any person is present or likely to
14 be present. That's what's required to be proved for aggravated
15 burglary.

16 And to distinguish between them, the Wilson court
17 stated that proof of one definition of Revised Code 2909.01,
18 does not prove the other. Nor does proof of one prove facts
19 sufficient to sustain a conviction for aggravated burglary
20 under Revised Code 2911.11(A)(3). A structure can be one that
21 was occupied as a permanent or temporary habitation without
22 being one under Revised Code 2909.01(D), where at the time any
23 one is present or likely to be present. So it can be occupied
24 structure even if nobody is present or likely to be present.
25 So it can be an occupied structure for burglary purposes just

1 if it's the temporary or permanent habitation of someone. And
2 the state does not have to prove that any one is present or
3 likely to be present. For aggravated burglary --

4 THE COURT: The presence or likely presence is
5 required?

6 MR. PATTON: Correct.

7 THE COURT: All right.

8 MR. PATTON: Your Honor, that portion of the Wilson
9 opinion directly conflicts with the Sixth Circuit's Lane case,
10 because Lane actually makes the statement that the Ohio
11 burglary statute, just burglary, presents a serious potential
12 risk of physical injury to another because the burglary statute
13 requires the actual or likely presence of a person in the
14 burglarized structure.

15 THE COURT: Say that again, you're quoting from the
16 case?

17 MR. PATTON: Yes. Now, understand Lane had already
18 determined that the Ohio burglary statute was broader than
19 generic burglary, until it said under Taylor it's not a
20 burglary.

21 THE COURT: All right.

22 MR. PATTON: They were trying to look at the
23 otherwise clause of the Armed Career Criminal Act's definition
24 of --

25 THE COURT: Otherwise presents a risk, etc.?

1 MR. PATTON: Correct.

2 THE COURT: Right.

3 MR. PATTON: Lane says "thus, burglary in Ohio
4 presents a serious potential risk of physical injury to
5 another, because the burglary statute requires the actual or
6 likely presence of a person in the burglarized structure."
7 And that is from Lane, United States v. Lane, 909 F.2d, 895 at
8 903. But the Ohio Supreme Court in Wilson specifically held
9 "a structure can be one that was occupied as a permanent or
10 temporary habitation without being one under Revised Code
11 2909.01(D), where at the time anyone is present or likely to be
12 present." That is State v. Wilson, 388 N.E.2d 745 at 750.
13 That's the Ohio Supreme Court (1979).

14 THE COURT: So you say there's a tension between
15 Lane and Wilson to the extent it's the Ohio Supreme Court
16 interpreting the Ohio statute trumps Lane?

17 MR. PATTON: Yes. Lane just got it wrong. Because
18 Wilson, the Wilson court specifically directly addressed the
19 issue and said that for burglary, a temporary or permanent
20 habitation can be -- the state can't prove that it was an
21 occupied structure by proving only that was the temporary or
22 permanent habitation of a person. And they don't have to
23 prove, in fact, it's not even relevant, as to whether or not a
24 person is present or likely to be present. And that the Wilson
25 court had to make that determination because the whole point of

1 the defendant in Wilson, the whole point of his argument was
2 that aggravated burglary and burglary was identical. So the
3 Wilson court had to decide whether there was a difference. The
4 difference they found was that burglary didn't require proof
5 that a person was present or likely to be present, but
6 aggravated burglary did require that. They also made it very
7 clear, the Ohio Supreme Court said that proof that an occupied
8 structure is a permanent or temporary habitation of someone,
9 does not equal proof that a person is present or likely to be
10 present. That is a separate element under aggravated burglary
11 that would have to be proven. So you cannot assume simply
12 because the occupied structure that was entered was the
13 temporary or the permanent habitation of an individual, that an
14 individual was present or even likely to be present.

15 Based on that, your Honor, you cannot find that the
16 burglary conviction is a crime of violence under the otherwise
17 clause. Because based just on the elements of what the state
18 has to prove, it is not otherwise likely to cause a serious
19 risk of injury to anyone. The burglary does not otherwise
20 involve conduct that presents a serious potential risk of
21 physical injury to another.

22 THE COURT: You're reading from the catch-all
23 clause?

24 MR. PATTON: Correct, that's the catch-all phrase of
25 924(e). That it's an offense that otherwise involves conduct

1 that presents a serious potential risk of physical injury to
2 another. But as defined by the Ohio Supreme Court, a burglary
3 conviction does not require any proof that any person is
4 present or likely to be present at the time the offense
5 occurred. And given the broad definition of occupied
6 structure, that it covers watercraft, aircraft, railroad cars,
7 trucks, a tent, a vehicle, then solely looking at the elements
8 of the offense, there is no way the court can make any finding
9 that this offense, the burglary Mr. Lewis was convicted of,
10 presented a serious potential risk of physical injury to
11 another. Because once the aggravated burglary got amended to
12 burglary, the part in the Indictment that charged that the
13 occupied structure or, excuse me, that Mr. Cross was either
14 present, or I guess more accurate to say any person was present
15 or likely to be present, the state didn't have to prove that,
16 that dropped off as an element of the offense. Indeed, if he
17 had actually admitted that, it wouldn't have been a plea to
18 burglary, it would have been a plea to aggravated burglary.
19 Now, the government in a footnote in their papers has a
20 discussion as to whether or not it's legal for an Indictment to
21 later be amended by the court. Whether that's true or not
22 true, there isn't any dispute that actually what happened is it
23 was amended, whether lawful or not, it was amended and he pled
24 to burglary. Once that amendment was made, the state did not
25 have to prove anyone was present or likely to be present. And

1 without that, without any person being present or likely to be
2 present, for all you know, based on the elements of the
3 offense, this was breaking into a car that somebody was
4 sleeping in. Because under the definition of occupied
5 structure, if I'm sleeping in my car, that's my at least
6 temporary habitation. And if I leave it parked and go
7 somewhere and somebody breaks into it, that could be a burglary
8 under Ohio law.

9 THE COURT: But not a generic burglary?

10 MR. PATTON: Well, it's burglary under Ohio law, but
11 it's not generic burglary as that term is defined by Taylor.

12 THE COURT: That's what I mean.

13 MR. PATTON: And it does not involve conduct that
14 presents a serious potential risk of injury to another.

15 THE COURT: Tell me again and I understand your
16 position on generic burglary, but since I can't go outside the
17 documents, I'm limited to what I can look at, under Taylor and
18 its progeny, you don't have generic burglary here, at least one
19 that you can legitimately find. Tell me secondarily, though,
20 why again, if you would, why the conduct here doesn't satisfy
21 the catch-all prong?

22 MR. PATTON: First of all, you have to understand
23 that you cannot look at the description of the offense listed
24 in the presentence report and say well, geez, it says he went
25 into an apartment -- and went into the apartment while the guy

1 was in the hospital. You can look at that. Shepard says that
2 you can't look at it, that's coming from a police report, we
3 don't know if it's accurate or not accurate.

4 THE COURT: To put a finer point on it, I of course
5 can look at it and did, but it doesn't get cranked into the
6 calculus?

7 MR. PATTON: Correct. Shepard says all you can look
8 at is a transcript of the plea or some kind of written plea
9 agreement where the defendant has acknowledged the accuracy of
10 the facts put in there.

11 THE COURT: All right.

12 MR. PATTON: So what you have to do in trying to
13 decide categorically does the offense prevent conduct that
14 presents a serious potential risk of physical injury to
15 another. You have to look at the elements of the Ohio burglary
16 and say under those elements categorically does it have to
17 involve conduct that presents a serious potential risk of
18 physical injury to another. But you can't do that because
19 under the Ohio burglary, there is no proof that anyone was
20 present or even likely to be present. And you can be talking
21 about breaking into a car or a boat or a trailer or an airplane
22 or a railroad car or a tent. All of those can be included in
23 occupied structure. And if the offense does not require any,
24 the presence or even likely presence of any person, then there
25 is no conduct that presents a serious potential risk of

1 physical injury. Otherwise, if you were to hold otherwise,
2 you're basically saying any time somebody breaks into a car,
3 there's a serious potential risk of injury. Or anytime
4 somebody breaks into a boat. Or, I guess it would be rare,
5 breaking into an aircraft. Or into a tent, or into a railroad
6 car. And so the only argument that has been presented to you
7 by the probation office and the government, as far as the
8 otherwise clause, is the Lane case from the Sixth Circuit.
9 But Lane is based on, its holding is based on an incorrect view
10 of Ohio law.

11 THE COURT: And Wilson preceded Lane, did it not?

12 MR. PATTON: Yes. In Lane they just blew it. Maybe
13 the issue wasn't presented to the Sixth Circuit very well, I
14 mean I can't explain it. But Lane says the burglary statute
15 requires the actual or likely presence of a person in the
16 burglarized structure. And Wilson cannot any more clearly
17 state that that is not an element of burglary. And in this
18 case, two things. Number one, the Sixth Circuit obviously is
19 not binding on you. Number two, state supreme courts are the
20 final arbiter of the meaning of state law. And the Ohio
21 Supreme Court in an opinion, where the sole issue was what's
22 the difference between aggravated burglary and burglary,
23 specifically found that the difference is an aggravated
24 burglary they have to prove the presence of a person or the
25 likely presence of a person. In burglary they do not have to

1 prove that. And they took the next step and said even if the
2 state proves temporary or permanent habitation, that fact does
3 not establish presence or even likely presence.

4 THE COURT: All right, I have your point. Let me
5 hear from Ms. Sanner, then if you have something else to say,
6 you can come up.

7 MS. SANNER: The question before this court is
8 whether the defendant's prior conviction for burglary in Ohio
9 is a violent felony under 924(e). It is not what the
10 difference is in Ohio between burglary and aggravated burglary.
11 This court in its decision-making is governed by Shepard,
12 Taylor, and the Third Circuit case of Bennett, which is cited
13 in the brief. I think it's helpful in the first instance, and
14 I'm going to approach the court, these were attached as
15 exhibits, I think it's helpful to look at. I've handed to the
16 court a copy of the true bill of the Indictment in this case.
17 And also the Ohio statute for aggravated burglary.

18 THE COURT: All right.

19 MS. SANNER: I'd ask the court to turn in the
20 statute to aggravated burglary, there is an Amendment Note
21 1995, which talks about the statute under which this defendant
22 was indicted in 1990.

23 THE COURT: I'm sorry, I'm looking at Amendment Note
24 1995?

25 MS. SANNER: Yes. And it talks about the section

1 previously read, then it goes on to state the language of
2 aggravated burglary that was in effect at the time the
3 defendant was indicted. And if you compare the language, hold
4 them side-by-side of the true bill with this language, you will
5 see that both of them read along no person, by force, stealth,
6 or deception, shall trespass in an occupied structure, as
7 defined in Section 2909.01 of the Revised Code, or in a
8 separately secured or separately occupied portion thereof, with
9 purpose to commit therein any theft offense as defined in
10 Section 2913.01 of the Revised Code, or any felony, when any of
11 the following apply. Tracking the language in the Indictment,
12 where the Indictment says as defined in Section 2913 of the
13 Revised Code, or a felony, there's an and there in the
14 Indictment. In this case the Indictment reads "and the
15 occupied structure involved is the present or temporary
16 habitation of Adelbert Cross in which at the time any person
17 was present or likely to be present." It is that and language
18 and the occupied structure involved is the permanent or
19 temporary habitation of Adelbert Cross, that narrows the charge
20 to generic limits.

21 THE COURT: When you say to generic limits, do you
22 mean to generic burglary?

23 MS. SANNER: Generic burglary pursuant to Taylor.
24 Taylor talks about generic burglary being the unlawful or
25 unprivileged entry into or remaining in a building or other

1 structure with intent to commit a crime. Here the Indictment
2 clearly states that the building or other structure was the
3 occupied structure, that being the permanent or temporary
4 habitation of Adelbert Cross. If the court goes on, in the
5 aggravated burglary statute and reads down a little bit,
6 Legislative Service Commission, 1973. It states --

7 THE COURT: Hang on a second.

8 MS. SANNER: In the aggravated burglary statute of
9 Ohio --

10 THE COURT: Yes.

11 MS. SANNER: There is a notation that says
12 Legislative Service Commission, 1973.

13 THE COURT: Yes.

14 MS. SANNER: That section states "this section
15 defines the most serious of the three breaking and entering
16 offenses contained in the new code." It goes down several
17 lines, "aggravated burglary is trespass in an occupied
18 structure, accomplished by force, stealth, or deception, for
19 the purpose of committing a felony or stealing, when the
20 offender is armed." That is subsection (A)(3). Or attempts
21 threatened harm, that is subsection (A)(1), to anyone. Or when
22 the structure involved is someone's home, that's subsection
23 (A)(2). The legislative history makes clear that habitation,
24 in the context of this, was intended to mean someone's home.
25 The habitation of Adelbert Cross, was Adelbert Cross's home.

1 That is what he was charged with in the Indictment in this
2 case. There was no allegation in the Indictment that he
3 threatened physical harm. There is no allegation that he had a
4 deadly weapon on him. There is, however, pursuant to
5 subsection (A)(3), the allegation that the occupied structure
6 involved is the permanent or temporary habitation of any person
7 in which at the time any person is present or likely to be
8 present. That is Adelbert Cross's home. Now, the Indictment
9 in this case was amended. But all that the amendment in this
10 case did was strike the language aggravated. That's all the
11 Indictment, that's all the amendment could do. And I don't
12 think the defendant is really disputing that, I cited a number
13 of cases in the brief that by striking just the caption, you do
14 not change the substantive language in the Indictment. The
15 court didn't have the authority to do that, and it didn't in
16 fact do that. The amendment to the Indictment didn't change
17 more than that, it struck the language aggravated. It
18 continued to charge the defendant with burglarizing,
19 specifically, the unoccupied structure that was the temporary
20 or permanent habitation of Adelbert Cross, that is Adelbert
21 Cross's home. I would also direct the court to Bennett, which
22 is a case again cited in the briefs that is from this circuit,
23 the Third Circuit. In Bennett, the Third Circuit was looking
24 at a Pennsylvania statute, which, like the Ohio statute before
25 you, was broad. And the court instructed that this court

1 should look to the Indictment, etc., in determining whether the
2 charged Indictment met generic limits in Taylor. In Bennett
3 the three prior burglaries were determined because the
4 defendant's prior counsel volunteered information to the court
5 that he had previously broke a window in a photomat booth,
6 burgled a variety store, and threw a brick at a bakery window.
7 The court found that based on these representations of counsel,
8 that the charges met the generic limits set forth in Taylor.
9 The government isn't asking you to do anything different, it's
10 exactly what Shepard or Taylor or Bennett would have the court
11 do, which is you look precisely at the language of the
12 Indictment. And the government's primary position is that
13 specifically charged in this case was the burglary of Adelbert
14 Cross's home, his habitation, as that's defined by Ohio law.
15 Wilson is not on point, it's an equal protection case. And
16 yes, there is a difference between aggravated burglary and
17 burglary. The question again before this court is was the
18 conviction in Ohio a violent felony pursuant to 924(e). Not is
19 there a difference between aggravated burglary and burglary.
20 Yes, there is.

21 The government's second position, which is aside
22 from the position that the Indictment clearly limited to
23 generic limits, the specific building or structure that was
24 burgled, is that under Lane, the defendant's conduct fits into
25 the otherwise clause of 924(e). Shall I move on to that

1 argument?

2 THE COURT: Yes.

3 MS. SANNER: Lane dealt with a prior conviction
4 being an attempted burglary. And the court in Lane held, the
5 Sixth Circuit, that under the Ohio burglary statute, burglary
6 is broader than the generic limits of Taylor. That court in
7 Lane found that it didn't have enough information based on any
8 Indictment or anything else before it, so that it could
9 determine whether Lane either burgled a building or a structure
10 pursuant to Shepard and Taylor. However, the court said that
11 this wasn't the only way that 924(e) applied and that, in fact,
12 Ohio burglary presents serious risks of injury. And,
13 therefore, burglary is a violent felony in Ohio under the
14 otherwise clause. And it did talk about the occupied structure
15 aspect, and that's because if you look at the Ohio burglary
16 statute or the attempted burglary, I'm sorry, the aggravated
17 burglary statute, they both deal with occupied structure.
18 Under the burglary statute, each of the four subsections that
19 defines burglary refers specifically to occupied structures or
20 permanent or temporary habitations in which a person is present
21 or likely to be present. All of those are occupied and that's
22 what Lane was concerned with. It wasn't concerned with whether
23 there was actually someone present at the moment, but whether
24 or not these are the types of buildings or structures in which
25 a person is likely to be present. Quoting from Lane, the court

1 said "because Ohio's burglary statute includes places other
2 than buildings, it is broader than the Supreme Court's generic
3 definition of burglary." Therefore, the court goes on, "it is
4 necessary to determine the Indictment, to determine if language
5 charged only with the burglary of a building." Here the
6 government's position, this is aside, is that the defendant was
7 charged. The defendant was charged with the burglary of
8 Adelbert Cross's habitation. On the basis of the record before
9 it, that court couldn't make that determination. It goes on to
10 state "an occupied structure defined in Ohio broadly to include
11 places in which a person is actually or likely to be present,"
12 it cites the Ohio Code, 2909.01. The committee comment
13 following that statute states the definition of general concept
14 is that the actual or likely presence of -- the definition of
15 general concept is that the actual or likely presence of a
16 person in a structure, regardless of the nature of the
17 structure itself, creates a more serious risk of harm from
18 commission of the burglary. Thus, burglary in Ohio "presents a
19 serious potential risk of physical injury to another." Because
20 the burglary statute requires the actual or likely presence of
21 a person in the burglarized statute.

22 Again, the other courts looking at this type of
23 issue, have ruled the same way in the government's favor. The
24 government's brief cites Spring, 80 F.3d 1450 (10th Cir. 1996),
25 burglary of habitation under Texas statute was a generic

1 burglary under Ohio. In this case the Indictment specifically
2 charges that Adelbert Cross's home, his habitation, was
3 burgled.

4 In the event that this court doesn't agree that the
5 home of Adelbert Cross is a specific building or structure,
6 then the government directs the court to Lane and to the
7 otherwise clause of the Armed Career Criminal Act. Because
8 burglary in Ohio represents a serious potential risk of
9 physical injury to another. Because the burglary statute
10 requires the actual or likely presence of a person in the
11 burglarized structure.

12 THE COURT: So you're equating habitation with home
13 or dwelling or building?

14 MS. SANNER: Yes.

15 THE COURT: Within the meaning of a generic
16 burglary?

17 MS. SANNER: Within the meaning of the statute with
18 which the defendant was charged. He was charged in the
19 Indictment with aggravated burglary. If you read through the
20 section of the statute that is applicable at the time the
21 defendant was charged, as well as the legislative notes to
22 that, it makes clear that what the legislature intended was to
23 charge as an aggravated burglary, those most serious
24 burglaries, when either the offender is armed, when he
25 threatened to hurt someone, or here when the offense involved

1 someone's home. The offense here involved, as specifically
2 charged in the Indictment, the burglary of Adelbert Cross's
3 habitation, that is to say his home.

4 THE COURT: Anything else you want to tell me?

5 MS. SANNER: I have an alternative motion for an
6 upward departure, but that's essentially the government's
7 position on the matter.

8 THE COURT: Well, we can postpone that argument if
9 it becomes germane.

10 MS. SANNER: Thank you.

11 THE COURT: All right, Mr. Patton. What about the
12 point here, the government's point to the last sentence of the
13 original Indictment, which is charging aggravated burglary.
14 And the occupied structure involved is the permanent or
15 temporary habitation of Adelbert Cross, in which at the time
16 any person was present or likely to be present?

17 MR. PATTON: Two things on that. First, even as
18 written in the Indictment, that does not establish that the
19 occupied structure was a building. Because occupied structure
20 means any house, building, outbuilding, watercraft, aircraft,
21 railroad car, truck, trailer, tent, or other structure, vehicle
22 or shelter.

23 THE COURT: So your first point is, is the face of
24 that Indictment, even as amended, if you take out aggravated
25 burglary and put in burglary, does not establish a generic

1 burglary within the meaning of Taylor?

2 MR. PATTON: Correct. Because saying that the
3 occupied structure is occupied as the permanent or temporary
4 habitation, doesn't mean that it has to be a building. If you
5 are living in your car under this statute, your car is an
6 occupied structure.

7 THE COURT: All right, I understand that. What's
8 your second point on this?

9 MR. PATTON: Secondly. The government wants to act
10 like Mr. Lewis got convicted of aggravated burglary as charged
11 in the Indictment. That is not what he pled to and was
12 convicted of. The government wants to pretend that all that
13 happened was the word aggravated was struck out and that didn't
14 have any substantive meaning whatsoever. Citing federal law
15 and law from other cases, to somehow say that in Ohio they
16 couldn't change the charge. What they're basically trying to
17 say is that a prosecutor in the state of Ohio cannot allow
18 somebody to plead to a less serious offense. Basically, their
19 position is if you're charged with aggravated battery, it
20 doesn't matter if you negotiate a plea or, excuse me,
21 aggravated burglary, doesn't matter if you negotiate a plea to
22 burglary, which changes the elements of the offense. We are
23 going to pretend that you actually got convicted of aggravated
24 burglary. And that is not how the law works. Prosecutors are
25 entitled, even if you have the person charged with an offense,

1 prosecutors are entitled to enter into plea agreements to allow
2 a defendant to plead guilty to a different offense. That is
3 what happened here. Mr. Lewis pled guilty to burglary.
4 Therefore, when you are doing your analysis as to whether or
5 not the offense Mr. Lewis pled guilty to involved conduct that
6 presents a serious potential risk of physical injury to
7 another, you have to look to the elements of the offense that
8 he was convicted of. He was convicted of burglary, not
9 aggravated burglary. The Ohio Supreme Court has said that for
10 burglary, the state does not have to prove, it is not an
11 element of the offense, that a person be present or that a
12 person likely be present at the time of the offense.
13 Therefore, you cannot assume, since that's not an element of
14 the offense --

15 THE COURT: Let me cut to the chase here, is this
16 what you're telling me. That notwithstanding the fact that
17 that language at the time any person was present or likely to
18 be present, appeared in the original aggravated burglary
19 charge, that when they changed the aggravated burglary to
20 burglary, and he pled to burglary, because not all of the
21 elements of the burglary statute require the presence or likely
22 presence of a person, that he was not necessarily pleading
23 guilty to the factual averment in the original charge that
24 someone was present or likely to be present, is that what
25 you're saying?

1 MR. PATTON: Correct, yes. Since you don't have a
2 transcript of the plea or any plea agreement that had a
3 factual --

4 THE COURT: Basically, what you're saying is the
5 criminal statute to which he pled guilty as amended, in
6 essence, trumps whatever verbiage might be in there upon which
7 the government relies for its armed career offender?

8 MR. PATTON: Correct. You can't use an Indictment
9 to an aggravated burglary to try and say well, he pled to
10 burglary, not aggravated burglary, but use the elements of the
11 aggravated burglary to decide how serious the offense was. He
12 did not plead guilty to aggravated burglary. You have no
13 evidence before you that when Mr. Lewis pled guilty to the
14 burglary count, the state proved or even said it could prove,
15 that there was a person present or likely to be present. And
16 you have no evidence that Mr. Lewis ever admitted that there
17 was somebody present or likely to be present. And since you
18 are doing a categorical approach --

19 THE COURT: Well, didn't he plead guilty to the
20 charge as amended?

21 MR. PATTON: He pled guilty to burglary. When you
22 do a guilty plea, you go over the elements of the offense that
23 the person is pleading guilty to. You don't go over the
24 elements of the offense to some other more serious offenses
25 that the person is not pleading to. And at a guilty plea all

1 the defendant must admit are the elements of the offense to
2 which he is pleading guilty. You cannot assume that Mr. Lewis
3 admitted to facts beyond those which were necessary to prove
4 burglary.

5 THE COURT: All right.

6 MR. PATTON: The legislative history that the
7 government cites to you, is absolutely meaningless. Because
8 you have the Ohio Supreme Court's interpretation of the
9 elements of burglary and aggravated burglary. And that trumps
10 any type of legislative history that there may be. Once the
11 Ohio Supreme Court says this is what burglary requires, this is
12 what aggravated burglary requires, the legislative history is
13 meaningless.

14 THE COURT: Is there anything else you want to tell
15 me?

16 MR. PATTON: Not on that point, your Honor.

17 THE COURT: Does it make sense at this point --
18 you're done as well on this issue?

19 MS. SANNER: Yes, your Honor.

20 THE COURT: Does it make sense at this point to take
21 a break -- I think I've got to rule on this one way or the
22 other before we move on to some of the other issues, it seems
23 to me, unless there is something else that could be cleaned up
24 right now?

25 MR. PATTON: No, I agree, you need to rule on this

1 and go from there.

2 THE COURT: All right. What I'm going to do is take
3 a recess and digest this.

4 (Recess from 11:19 a.m.; until 11:25 a.m.)

5 THE COURT: I'm not going on with the sentencing
6 right now, either. We need to look at this and it's somewhat
7 complicated. So we're going to take a break in the sentencing
8 and we're going to reconvene and finish this up at 2 o'clock.
9 Are you available at 2 o'clock?

10 MR. PATTON: Yes, sir.

11 MS. SANNER: Yes, your Honor.

12 THE COURT: We're in recess until 2:00.

13 (Luncheon recess from 11:25 a.m.; until 2:00 p.m.)

14 THE COURT: All right, let me just ask another
15 question before we get going. And actually this is going to be
16 directed to you as well. Do I take it that, for our purposes,
17 we are concerned only with Ohio's definition of burglary as
18 found in 2911.12(A)(1), which makes it unlawful to trespass by
19 force, stealth, or deception, in an occupied structure with
20 purpose to commit therein any theft offense or any felony?

21 MR. PATTON: Yes.

22 THE COURT: Is that right?

23 MS. SANNER: Sort of.

24 THE COURT: Well, I don't know. If you're sort of
25 right, you're sort of wrong.

1 MS. SANNER: All I mean to say is I think that the
2 issue before the court is the 924(e) issue. Burglary --

3 THE COURT: I understand that. I'm talking about
4 the amended charge, there is no disagreement that's what he
5 pled to?

6 MS. SANNER: There is no disagreement that he pled
7 to a burglary charge.

8 THE COURT: But more specifically, there is no
9 disagreement he pled to the charge as I just read it to you, is
10 that right?

11 MS. SANNER: Yes. But it includes the language that
12 is set forth in the Indictment. That language didn't change
13 and that's the government's position on that.

14 MR. PATTON: I disagree with the prosecutor that the
15 language in the Indictment controls. I agree with you that
16 it's the subsection of Ohio's burglary statute that you
17 referred to that Mr. Lewis pled to.

18 THE COURT: All right. This is an order.

19 ORDER

20 The defendant objects to paragraph 27 of the
21 presentence report which states that he has sustained three
22 prior convictions for violent felonies for purposes of applying
23 the sentencing enhancement in 18 U.S.C. Section 924(e),
24 commonly referred to as the "Armed Career Criminal Act"
25 ("ACCA"). Section 924(e) defines "violent felony," in relevant

1 part as:

2 Any crime punishable by imprisonment for a term
3 exceeding one year... that -

4 (i) has an element the use, attempted use, or
5 threatened use of physical force against the person
6 of another; or

7 (ii) is burglary, arson, or extortion, involves use
8 of explosives, or other involves conduct that
9 presents a serious potential risk of physical injury
10 to another...

11 18 U.S.C. Section 924(e) (2) (B) .

12 The issue then before the court is whether
13 defendant's 1991 conviction for burglary in Ohio constitutes a
14 conviction for a "violent felony" within the meaning of Section
15 924(e) .

16 Because of the fact that states have defined the
17 crime of "burglary" in varying fashions, questions have arisen
18 as to 924(e)'s application with regard to prior convictions for
19 burglary. In Taylor v. United States, 495 U.S. 575 (1990), the
20 Supreme Court held that an offense constitutes "burglary" under
21 Section 924(e) if, irrespective of its exact definition or
22 label, it has the basic elements of a "generic" burglary -
23 i.e., an unlawful or unprivileged entry into, or remaining in,
24 a building or other structure, with intent to commit a crime.
25 Moreover, the court held that, in determining whether a prior

1 conviction involved the elements of "generic" burglary, a
2 sentencing court is limited to examining only the fact of
3 conviction and the statutory definition of the prior offense.
4 The court recognized a limited exception in "narrow range of
5 cases where a jury was actually required to find all the
6 elements of generic burglary." 495 U.S. at 602. "For
7 example," the court wrote, "in a State whose burglary statutes
8 include entry of an automobile, as well as a building, if the
9 indictment or information and jury instructions show that the
10 defendant was charged only with a burglary of a building, and
11 that the jury necessarily had to find an entry of a building to
12 convict, then the government should be allowed to use the
13 conviction for enhancement." Id. Thus,

14 an offense constitutes "burglary" for purposes of a
15 Section 924(e) sentence enhancement if either its
16 statutory definition substantially corresponds to
17 "generic" burglary, or the charging paper and jury
18 instructions actually required the jury to find all
19 the elements of generic burglary in order to convict
20 the defendant. Taylor, 495 U.S. at 602.

21 In Shepard v. United States, 544 U.S. 13 (2005), the
22 Supreme Court addressed Section 924(e)'s application in the
23 context of a prior burglary conviction obtained through a
24 guilty plea. The court acknowledged that guilty pleas may
25 establish the requisite predicate violent felony offenses for

1 purposes under the ACCA and that Taylor's reasoning applies in
2 such situations. The court further ruled that, for purposes of
3 determining whether a defendant - in the course of pleading
4 guilty under a non-generic burglary statute - necessarily
5 admitted to elements of a generic burglary, the sentencing
6 court is limited to an examination of the terms of the charging
7 document, the terms of a plea agreement or transcript of the
8 colloquy between the judge and the defendant in which the
9 factual basis for the plea was confirmed by the defendant, or
10 to some comparable judicial record of such information. The
11 sentencing court, however, may not look to police reports or
12 complaint applications to determine whether an earlier guilty
13 plea necessarily admitted, and supported a conviction for,
14 generic burglary. See Shepard, 544 U.S. at 16, 26.

15 In the case of United States v. Lane, 909 F.2d 895
16 (6th Cir. 1990), the Sixth Circuit Court of Appeals addressed
17 the issue of whether a defendant's prior conviction under Ohio
18 law for attempted burglary constituted a "violent felony" for
19 purposes of the ACCA's sentencing enhancement. The Sixth
20 Circuit observed that Ohio's burglary statute, set forth at
21 Ohio Revised Code, Section 2911.12, is broader than the Supreme
22 Court's "generic" definition of burglary. Since it could be
23 applied to the unprivileged entry into "occupied structures"
24 other than buildings, including, among other things,
25 watercraft, aircraft, railroad cars, trucks, trailers, tents,

1 or other vehicles or shelters. The Lane court found that,
2 given Ohio's non-generic definition of "burglary," it was
3 necessary to examine the defendant's indictment to determine
4 whether Lane had been charged only with the burglary of a
5 building and thus, whether his conviction for attempted
6 burglary fell within the Supreme Court's generic definition - a
7 determination which could not be made based on the
8 then-existing appellate record.

9 The Lane court then went on to consider whether the
10 ACCA's sentencing enhancement was nevertheless appropriate
11 under Section 924(e)'s alternative language which applies to
12 any crime that "otherwise involves conduct that presents a
13 serious potential risk of physical injury to another." 18
14 U.S.C. Section 924(e)(2)(B)(ii). The Sixth Circuit held that
15 Lane's prior conviction for attempted burglary did constitute a
16 "violent felony" under this language because, in the court's
17 view, burglary in Ohio "requires the actual or likely presence
18 of a person in the burglarized structure," which thus "presents
19 a serious potential risk of physical injury to another." 909
20 F.2d at 903.

21 The present case, like the Lane case, requires me to
22 consider the effect of a prior conviction under Ohio's burglary
23 statute. Like the Lane court, I conclude that Ohio's Revised
24 Code defines "burglary" more broadly than the generic
25 definition adopted by the Supreme Court in Taylor. Thus, under

1 Taylor, it is appropriate for me to look to the charging
2 document and official court papers setting forth the plea terms
3 to determine whether, as a factual matter, Mr. Lewis pleaded
4 guilty to the elements of a generic burglary. In that regard,
5 the government has supplied the indictment, which originally
6 charged Mr. Lewis with the offense of aggravated burglary under
7 Ohio's Revised Code Section 2911.11, and the official journal
8 entry documenting Mr. Lewis's guilty plea to the amended charge
9 of burglary under Ohio R.C. Section 2911.12. As far as I can
10 tell from these documents, the only amendment made to the
11 language of the indictment is the substitution of the word
12 "burglary" in place of "aggravated burglary." Consequently,
13 the most that I can discern from the official court papers is
14 that, as a factual matter, Mr. Lewis pleaded guilty to having
15 unlawfully trespassed, by force, stealth or deception, in an
16 "occupied structure" - that being the permanent or temporary
17 "habitation" of one Adelbert Cross - with the intent to commit
18 a theft or felony therein, at a time when another person was
19 present or likely to be present.

20 Based on these facts, I cannot conclude that Mr.
21 Lewis pleaded guilty to the elements of a generic burglary as
22 defined in Taylor v. United States. The government points out
23 that the "occupied structure" as at issue here was the
24 "habitation" - or "home" - of Mr. Cross and, on that basis, it
25 urges me to find that the criteria for a generic burglary are

1 necessarily satisfied. But the fact that Mr. Lewis may have
2 burglarized an "occupied structure" that was another person's
3 "home" or "habitation" does not necessarily resolve the issue
4 of whether he burglarized a "building or other structure"
5 within the meaning of Taylor, because Ohio defines "occupied
6 structures" to include - among other things - aircraft,
7 watercraft, tents, and railroad cars - all of which fall
8 outside the purview of a generic burglary as defined by Taylor.
9 It is conceivable - though perhaps unlikely - that Mr. Cross's
10 home or habitation could have been in a tent, a boat, a
11 railroad car, or some other "occupied structure" that, under
12 Taylor, falls outside the boundaries of generic burglary.
13 Suffice to say that an examination of the official court
14 documents in this case does not definitively resolve that
15 issue.

16 Alternatively, the government cites Lane for the
17 proposition that Mr. Lewis's prior burglary conviction counts
18 as a "violent felony" because it is a crime that "otherwise
19 involves conduct that presents a serious potential risk of
20 physical injury to another." See Section 924(e)(2)(B)(ii).
21 See also Taylor, 495 U.S. at 600 n.9. ("The government remains
22 free to argue that any offense - including offenses similar to
23 generic burglary - should count towards enhancement as one that
24 'otherwise involves conduct that presents a serious potential
25 risk of injury to another' under Section 924(e)(2)(B)(ii)").

1 In Lane the Court of Appeals noted that burglary in
2 Ohio requires unlawful trespass in an "occupied structure" with
3 intent to commit a theft therein. Ohio defines "occupied
4 structure" to mean:

5 any house, building, outbuilding, watercraft,
6 aircraft, railroad car, truck, trailer, tent, or
7 other structure, vehicle, or shelter, or any portion
8 thereof, to which any of the following applies:

9 (1) It is maintained as a permanent or temporary
10 dwelling, even though it is temporarily unoccupied and whether
11 or not any person is actually present.

12 (2) At the time, it is occupied as the permanent or
13 temporary habitation of any person, whether or not any person
14 is actually present.

15 (3) At the time, it is specially adapted for the
16 overnight accommodation of any person, whether or not any
17 person is actually present.

18 (4) At the time, any person is present or likely to
19 be present in it.

20 Ohio R.C. Section 2909.01(C) (West 1993).

21 The Lane court interpreted this statutory definition
22 of the term "occupied structure" as being "defined broadly to
23 include places in which a person is actually or likely to be
24 present." 909 F.2d at 903 (citing Ohio Rev. Code Ann. Section
25 2909.01). Quoting a comment by the Legislative Service

1 Commission, the court further observed that "[t]he definition's
2 general concept is that the actual or likely presence of a
3 person in a structure, regardless of the nature of the
4 structure itself, creates a more serious risk of harm from
5 commission of arson, burglary, and related offenses, and thus
6 warrants more severe treatment of offenders." Id. (citing Ohio
7 Rev. Code Ann. Section 2909.01, Legislative Service Commission
8 Comment). The Lane court therefore concluded that "burglary in
9 Ohio 'presents a serious potential risk of physical injury to
10 another' because the burglary statute requires the actual or
11 likely presence of a person in the burglarized structure."
12 Id. (emphasis added).

13 Mr. Lewis takes issue with Lane's conclusion that
14 the actual or likely presence of a person in the burglarized
15 structure is a required element for burglary in Ohio.
16 Defendant contends that the aforecited conclusion is both
17 legally wrong and in direct conflict with the Ohio Supreme
18 Court's decision in State v. Wilson, 388 N.E. 2d. 745 (Ohio
19 1979).

20 In Wilson, the Ohio Supreme Court was asked to
21 interpret the meaning of the term "occupied structure" in
22 connection with a defendant's constitutional challenge to his
23 conviction under Ohio's aggravated burglary statute. The
24 defendant in Wilson contended that the elements for conviction
25 under Ohio's aggravated burglary statute were the same as for

1 simple burglary and, therefore, he should have been sentenced
2 under the less serious burglary statute.

3 The version of Ohio's Revised Code that was in
4 effect at the time of Wilson's conviction is identical in all
5 material respects to the version applicable here. It defined
6 the crime of aggravated burglary, in relevant part, as follows:

7 "No person, by force, stealth, or deception, shall
8 trespass in an occupied structure..., or in a
9 separately secured or separately occupied portion
10 thereof, with purpose to commit therein any theft
11 offense... or any felony, when... [t]he occupied
12 structure involved is the permanent or temporary
13 habitation of any person, in which at the time any
14 person is present or likely to be present."

15 Ohio R.C. Section 2911.11(A) (3) (West 1993).

16 Ohio defined the crime of burglary, in relevant
17 part, as follows:

18 "No person, by force, stealth, or deception,
19 shall... trespass in an occupied structure or in a
20 separately secured or separately occupied portion
21 thereof, with purpose to commit therein any theft
22 offense or any felony."

23 See Ohio R.C. Section 2911.12(A) (1) (West 1993). The term
24 "occupied structure," as noted above, was defined as "any
25 house, building, outbuilding, watercraft, aircraft, railroad

1 car, truck, trailer, tent, or other structure, vehicle, or
2 shelter, or any portion thereof, to which any of the following
3 applies:

4 (A) Which is maintained as a permanent or temporary
5 dwelling, even though it is temporarily unoccupied, and whether
6 or not any person is actually present;

7 (B) Which at the time is occupied as the permanent
8 or temporary habitation of any person, whether or not person is
9 actually present;

10 (C) Which at the time is specially adapted for the
11 overnight accommodation of any person, whether or not any such
12 person is actually present;

13 (D) In which at the time any person is present or
14 likely to be present in it.

15 See 388 N.E.2d at 748-49 (citing Ohio R.C. Section 2909.01).

16 The Wilson court noted that the defendant's
17 constitutional challenge turned on the question of whether, the
18 foregoing definitions of an "occupied structure" - particularly
19 the definitions under subsections (B) and (D) - are read
20 cumulatively or, rather, disjunctively. Specifically if, in
21 proving the second element of burglary - that the thing
22 trespassed upon was an "occupied structure" - the state had to
23 prove both that the place was someone's habitation and that
24 another person was either present or likely to be present at
25 the time of the trespass, then the elements required under

1 simple burglary would be identical to those required for an
2 aggravated burglary. The two offenses would, in effect, be
3 identical and the defendant's conviction under the aggravated
4 burglary would have violated equal protection principles.

5 However, the Wilson court ruled that there was no
6 equal protection violation raised by the statutes because the
7 four definitions of "occupied structure" were to be read
8 disjunctively. The court explained:

9 ... In proving burglary the state need only prove
10 that the structure was a permanent or temporary
11 habitation, or a structure in which any person is
12 present or is likely to be present. It need not
13 prove both. In aggravated burglary, under R.C.
14 2911.11(A)(3), the state must shoulder the
15 additional burden of proving both. That is to say,
16 in an aggravated burglary case, the structure must
17 be one that was both the permanent or temporary
18 habitation of any person AND in which at the time
19 any person was present or likely to be present. If
20 the state can prove only that the building was
21 occupied as a permanent or temporary habitation OR
22 that someone was present or likely to be present, a
23 conviction for burglary, but not aggravated
24 burglary, will stand.

25 R.C. 2911.11, aggravated burglary, carries a higher

1 penalty because it is designed to protect homes
2 where the danger of harm is greatest. The
3 aggravated burglary statute, by its own terms,
4 requires two elements of proof, permanent or
5 temporary habitation and presence or likelihood of
6 presence. This additional element of proof placed
7 upon the state as part of its burden of proof
8 clearly distinguishes the crime from simple
9 burglary.

10 That's 388 N.E.2d at 750.

11 The Wilson court further explained that, proof of
12 one definition of an "occupied structure" does not necessarily
13 equate to proof of a different definition, nor does proof of
14 only one definition suffice to sustain a conviction under
15 aggravated burglary: "A structure can be one that was occupied
16 as a permanent or temporary habitation without being one under
17 R.C. 2909.01(D), where at the time anyone is present or likely
18 to be present. The converse is also true." Id. The court
19 also rejected the notion that, proof of a habitation being
20 burglarized creates a presumption that a person is likely to be
21 present for purposes of establishing an aggravated burglary.
22 Such a presumption, the court found, would violate due process
23 principles by unconstitutionally presuming the existence of an
24 element of the offense. Id.

25 I'm going to take a two-minute recess and come back

1 and continue on with this.

2 (Recess from 2:30 p.m.; until 2:35 p.m.)

3 THE COURT: In the case at bar, Mr. Lewis argues
4 that the Ohio Supreme Court's ruling in Wilson cannot be
5 reconciled with the Lane court's statement that the Ohio
6 burglary statute "requires the actual or likely presence of a
7 person in the burglarized structure." See Lane, 909 F.2d at
8 903. As a technical matter, Mr. Lewis is correct. Under
9 Wilson, the actual or likely presence of a person is not a
10 required element of proof for the crime of burglary.
11 Nevertheless, this technical inaccuracy is not dispositive of
12 the ultimate question before me - that is, whether the crime of
13 burglary, as defined by Ohio's criminal code, involves conduct
14 that presents a serious potential risk of physical injury to
15 another.

16 I begin by reiterating that, in determining whether
17 an offense fits under this residual "otherwise clause," of
18 Section 924(e)(2)(B)(ii), I must employ the "categorical
19 approach" taken by the Supreme Court in Taylor, supra, looking
20 only to the fact of conviction and the statutory definition of
21 the prior offense, not the particular facts at shown by the
22 record of conviction. See Shepard, 544 U.S. at 17; Taylor, 495
23 U.S. at 602.

24 For present purposes we are concerned only with
25 Ohio's definition of burglary as found in Ohio R.C. Section

1 2911.12(A)(1), which makes it unlawful to trespass, by force,
2 stealth, or deception "in an occupied structure... with purpose
3 to commit therein any theft offense or any felony." As an
4 aside, I note that Ohio's burglary statute includes two
5 felonious circumstances under which the crime can occur:

6 [Trespass] by force, stealth, or deception:

7 (2) ...in a permanent or temporary habitation of any
8 person when any person is present or likely to be present, with
9 the purpose to commit in the habitation any misdemeanor that is
10 not a theft offense.

11 (3) ...in a permanent or temporary habitation of any
12 person when any person is present or likely to be present.
13 Ohio R.C. Section 2911.12(A)(2) and (3) (West 1993).

14 I also note parenthetically that both of these
15 definitions of burglary do expressly require the actual or
16 likely presence of an individual within the habitation
17 burglarized. Accordingly, these aspects of the burglary
18 statute would appear to involve conduct that raises the
19 potential for physical confrontation within the home and, thus,
20 serious potential risk of physical injury to an individual.
21 As we have seen, Ohio defines "occupied structure" in four
22 different ways. Fundamentally, though, whether the place
23 burglarized is a car, boat, house, railroad car, tent,
24 aircraft, or other structure, it is not deemed an "occupied
25 structure," and therefore cannot give rise to a burglary

1 conviction: unless that place is maintained as a dwelling,
2 occupied as a habitation, adapted for overnight accommodation;
3 or unless at the time a person is present or likely to be
4 present. See Ohio R.C. Section 2909.01(C). Each of the
5 foregoing circumstances involve at least an underlying serious
6 potential for confrontation between the burglar and another
7 individual because dwellings, habitations, and places adapted
8 for overnight accommodation are the very types of places where
9 one would expect that other persons would potentially be
10 present. (Under the fourth definition of "occupied structure,"
11 the state must actually prove that an individual was present or
12 likely to be present.) It is true that stealing from a
13 railroad car or automobile or boat, might not raise any real
14 potential for physical injury in many cases. However, it is
15 important to note that such conduct cannot give rise to a
16 burglary conviction under Ohio law in the first place, unless
17 it is proved that the railroad car, or automobile, or boat, is
18 being maintained as a dwelling or used as a habitation or is
19 specially adapted for overnight accommodation, or someone is
20 actually present or likely to be present. When the Ohio
21 statute is fairly read, its definition of burglary satisfies
22 the criteria of Section 924(e)'s residual clause. Thus, I
23 conclude that the crime of burglary under Ohio R.C. Section
24 2911.12(A)(1) is a crime involving conduct that presents a
25 serious potential risk of physical injury to another

1 individual.

2 In arriving at this conclusion, I have given careful
3 consideration to the defendant's arguments, particularly the
4 import of the Ohio Supreme Court's decision in State v. Wilson,
5 supra. As indicated above, Wilson can be fairly read as
6 establishing that the crime of burglary in Ohio does not
7 necessarily require proof of an individual's presence or likely
8 presence in the burglarized structure. Because actual or
9 likely presence of an individual is not a required element of
10 proof, it is technically possible that a defendant can be
11 guilty of burglarizing a dwelling, or a habitation, or a place
12 having overnight accommodations, even when there was no one
13 present nor any likelihood under the particular facts that
14 another person would be present.

15 Nevertheless, as the Supreme Court has recently
16 advised, Taylor's categorical approach does not require "that
17 every conceivable factual offense covered by a statute must
18 necessarily present a serious potential risk of injury before
19 the offense can be deemed a violent felony." James v. United
20 States, 127 S.Ct. 1586, 1597. "Rather," the court has
21 admonished, "the proper inquiry is whether the conduct
22 encompassed by the elements of the offense, in the ordinary
23 case, presents a serious potential risk of injury to another."
24 Id.

25 In James, the United States Supreme Court considered

1 application of the ACCA's "otherwise" clause and, specifically,
2 whether the crime of attempted burglary under Florida law
3 "otherwise involved conducted that presents a serious potential
4 risk of physical injury to another" within the meaning of
5 Section 924(e)(2)(B)(ii). The court ruled that the crime did
6 satisfy Section 924(e)(2)(B)(ii)'s residual clause and, in so
7 doing, it rejected an argument by the defendant that the crime
8 of attempted burglary cannot be treated as a predicate "violent
9 felony" unless all applications of the statute present a risk
10 of physical injury.

11 As the court explained in James:

12 One could, of course, imagine a situation in which
13 attempted burglary might not pose a realistic risk
14 of confrontation of injury to anyone - for example,
15 a break-in of an unoccupied structure located far
16 off the beaten path and away from any potential
17 intervener. But ACCA does not require metaphysical
18 certainty. Rather, Section 924(E)(2)(B)(ii)'s
19 residual provision speaks in terms of a "potential
20 risk." These are inherently probabilistic concepts.
21 Indeed, the combination of the two terms suggests
22 that Congress intended to encompass possibilities
23 even more contingent or remote than a simple "risk,"
24 much less a certainty.

25 127 S.Ct. at 1597.

1 Applying James's directive to the case at bar, I
2 conclude that the conduct proscribed by Ohio's burglary
3 statute, in the "ordinary case," James, 127 S.Ct. at 1597,
4 presents a serious potential risk of injury to others. This is
5 true even though, as per the Wilson decision, there may well be
6 cases in which the burglary did not involve the presence or
7 likely presence of another person in the burglarized structure.
8 As I have noted, because of the way that "occupied structure" -
9 an essential element of the crime - is defined under the Ohio
10 statute, a burglary can only occur if the target location is
11 maintained as a dwelling, occupied as a habitation, adapted for
12 overnight accommodation, or if a person was actually or likely
13 to be present. These scenarios present circumstances under
14 which, at the very least, there is a serious potential for
15 physical injury because they are, by their very nature,
16 locations where others will potentially be present. This basic
17 reality was recognized by the Legislative Service Commission
18 when it noted that, "The definition's general concept is that
19 the actual or likely presence of a person in a structure,
20 regardless of the nature of the structure itself, creates a
21 more serious risk of harm from commission of arson, burglary,
22 and related offenses, and thus warrants more severe treatment."
23 See Ohio Rev. Code Section 2909.01 (comment).

24 I recognize that, as per the Wilson decision, the
25 Ohio Supreme Court has held that proof of unlawful entry into a

1 habitation does not give rise to any legal presumption that an
2 individual was either present or likely to be present within
3 the burglarized structure. However, Wilson's holding must be
4 read in its proper context. As I read that decision, the Ohio
5 Supreme Court was ruling that proof that the defendant
6 burglarized a habitation does not, as a matter of law,
7 establish that a person was present or likely to be present at
8 the time of the offense - therefore, it does not automatically
9 establish the elements necessary for aggravated burglary. Nor
10 does proof of a burglarized habitation give rise to a factual
11 presumption that another person was present or likely to be
12 present, as might remove the state's burden of proof on the
13 issue in an aggravated burglary case. The upshot of Wilson is
14 that, if the state wants to prove aggravated burglary, it must
15 offer proof to establish, beyond a reasonable doubt, the
16 requisite element that another person was present or likely to
17 be present.

18 For my purposes, though, in construing and applying
19 the ACCA, I am not required to make findings beyond a
20 reasonable doubt. As the Supreme Court in James made clear,
21 the "ACCA does not require metaphysical certainty" and we are
22 dealing with the inherently probabilistic concepts of
23 "potential risk." In my opinion, the conduct proscribed under
24 Ohio's burglary statute, as applied in the "ordinary case," is
25 precisely the type of conduct that presents a serious potential

1 risk of injury to others because, by definition, it requires
2 that the burglar invade a dwelling, habitation, a place
3 equipped for sleeping, or some other location where other
4 people are either present or likely to be present. In my
5 opinion, Wilson does not preclude such a finding. And,
6 consequently, the defendant's objection in this regard is
7 overruled. Mr. Patton.

8 MR. PATTON: Your Honor, since you mentioned the
9 James case and that wasn't argued, I would like the record to
10 state that the last footnote of its majority opinion in that
11 case specifically found that the Florida statute at issue was
12 not a burglary statute, that was broader than the generic
13 burglary definition and did not cover vehicles and the like
14 and, therefore, they found their opinion did not cover statutes
15 that were broader than the general generic burglary.
16 Obviously, in our case, in this case the Ohio statute is. So I
17 understand you made your ruling, but I want to make that point
18 because the government didn't cite James in their papers.

19 THE COURT: They did not.

20 MR. PATTON: I don't want it to somehow on appeal
21 the government argue that I waived any arguments under James.
22 But I do think James is distinguishable for that point, and
23 that taking the James's rationale -- you only have to have, you
24 don't have to have metaphysical certainty and that you can talk
25 about inherent probabilities, is this is getting it stretched

1 even one part farther, because in the James case they were
2 dealing with a Florida statute that it had to be a home. And
3 they talked about that. Then in this case we're not talking
4 about a home, it had to be a structure there. I understand
5 your ruling on the definition of occupied structure. But I do
6 think James is distinguishable in that your application of it
7 in this context stretches it beyond the length that it should
8 be applied.

9 THE COURT: All right. Obviously, you're going to
10 have an opportunity to make an argument in full. Beyond that,
11 were there any other things that needed to be cleaned up by way
12 of objections?

13 MR. PATTON: No, sir. We already preserved our
14 argument that under Justice Thomas's concurring opinion in
15 Shepard, the government should have to prove priors to a jury
16 beyond a reasonable doubt.

17 THE COURT: All right. Mr. Patton, is there
18 anything, before we move on here, that your client would like
19 to say and/or is there anything that you would like to say?

20 MR. PATTON: Well, your Honor, obviously, the
21 guideline range is below the 15-year mandatory minimum, so
22 there's not much we can say. But Mr. Lewis would like to make
23 a statement to your Honor.

24 THE COURT: All right, do you want to have him come
25 up here to the podium.

1 THE DEFENDANT: Your Honor, I got a note here, I'm
2 really pleading for my freedom and my life. It says, Dear your
3 Honorable Judge McLaughlin. My name is Barry Lewis. I am
4 writing this in regards to my case and praying, and I mean
5 praying, sir, that you show leniency and not give me 15 years
6 or a lot of time.

7 Sir, I did simply find this rifle. I was going to
8 turn it into the police as soon as I got to my sister's house,
9 I was going to do this, sir. But the police caught me with it
10 before I could even do that. I don't even know what I was
11 thinking that night myself, I should have just left it there,
12 and I should have just went to the phone, but I wasn't
13 thinking, sir. I just wasn't thinking. I wanted to get it off
14 the streets so it didn't get in the hands of a child or some
15 neighborhood gangster kids or something, sir. I just, my mind
16 was going haywire that night, sir. I didn't mean no harm with
17 it. I didn't commit any crimes with it. And nor was I going
18 to even try to own it. My sister, she's here in this courtroom
19 right now, and she will tell you she wouldn't even let me have
20 a beer in the house, let alone a firearm, sir.

21 I'm just begging and pleading with you that you show
22 me leniency, sir. I'm sorry I got into this. If I'd known I
23 was going to get into so much trouble here like this, I
24 wouldn't have gotten involved at all with this dumb thing.
25 Sir, please for God's sake, would you please show leniency to

1 me, please, sir. That's all I have to say.

2 THE COURT: All right, Mr. Lewis, thank you.
3 Ms. Sanner.

4 MS. SANNER: Your Honor, the government did fail to
5 cite James. We relied on --

6 THE COURT: Let me just say as an aside -- well,
7 neither side, everybody is busy, but no one ever cites all the
8 applicable cases. I'm not certainly pointing a finger or being
9 critical of anybody. It would have been useful, though, if
10 that issue had been joined. I mean, obviously, in my view it
11 was an important case, it wasn't brought to my attention by the
12 government.

13 MS. SANNER: Right. I did actually intend to
14 mention it in oral argument today, but I skipped doing that.
15 Lane, obviously, is cited by James with approval. Lane is a
16 case that the government was relying on. Bennett in the Third
17 Circuit also cites Lane with approval. I kind of was relying
18 on that. In any event, the defendant's criminal history in
19 this case speaks for itself. He has a lengthy criminal history
20 from the age of 19. From 1978, he has seven adult convictions,
21 ten additional arrests, in addition to this conviction. They
22 are for very violent crimes, including aggravated menacing,
23 abduction, burglary, assault with a deadly weapon, felonious
24 assault, kidnapping, I won't go through them all. Various
25 parole violations in the most recent years. If the court makes

1 a time line of the offenses, it will see offenses in '78, three
2 in '80, one in '81, one in '82, I could just go through the
3 offenses here, but I won't take the court's time to do that.
4 He has a lengthy, serious, violent criminal history showing a
5 potential for both violence and recidivism. The government
6 would ask that you consider all of this in imposing sentence.

7 THE COURT: Mr. Patton.

8 MR. PATTON: Yes, sir.

9 THE COURT: When my law clerk comes in, I recognize
10 you're going to have an opportunity to make these arguments to
11 a higher court, but I want to hear again from you momentarily
12 the basis upon which you think the James opinion is
13 distinguishable?

14 MR. PATTON: Yes, sir.

15 THE COURT: All right. Hold your thought for one
16 second. Do you want to come up to the podium. And you're
17 obviously intimately familiar with the opinion?

18 MR. PATTON: I have read it, I don't have a copy
19 with me.

20 THE COURT: Would you like a copy, would that help
21 you?

22 MR. PATTON: Just to identify the footnote. I'm
23 confident it's the last footnote of the majority opinion, I
24 don't know what number it is. Part of the issue in the Florida
25 case was --